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No. 84-68

In The
Supreme Court of the United States
October Term, 1984

Kerr-McGee Corporation,
Petitioner,
v.
The Navajo Tribe of Indians, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICI CURIAE OF ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., THE CHEYENNE RIVER SIOUX TRIBE OF THE CHEYENNE RIVER RESERVATION, SOUTH DAKOTA, THE NEZ PERCE TRIBE OF IDAHO, THE PUEBLO OF LAGUNA OF NEW MEXICO AND THE SENECA NATION OF INDIANS OF NEW YORK IN SUPPORT OF RESPONDENTS

Arthur Lazarus, Jr., P.C.*
W. Richard West, Jr.
Fried, Frank, Harris, Shriver & Kampelman
600 New Hampshire Ave., N.W.
Suite 1000
Washington, D.C. 20037
(202) 342-3500
Attorneys for Association on American Indian Affairs, Inc., Cheyenne River Sioux Tribe, Nez Perce Tribe, Pueblo of Laguna and Seneca Nation of Indians

* Attorney of Record

Wilson - Epes Printing Co., Inc. - 789-0096 - Washington, D.C. 20001

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Pursuant to Rule 36.2, the Association on American Indian Affairs, Inc., a tax-exempt organization, having its principal office at 95 Madison Avenue, New York, New York 10016; the Cheyenne River Sioux Tribe, having its principal office at P.O. Box 590, Eagle Butte, South Dakota 57625; the Nez Perce Tribe, having its principal office at P.O. Box 305, Lapwai, Idaho 83540; the Pueblo of Laguna, having its principal office at P.O.

Box 194, Laguna, New Mexico 87026; and the Seneca Nation of Indians of New York, having its principal office at 1500 Route 438, Irving, New York 14081, file the attached brief *amici curiae* in support of the Respondents in the above-captioned case. Petitioner, Kerr-McGee Corporation, and Respondent, the Navajo Tribe of Indians, *et al.*, have consented in writing to the filing of this brief.

INTEREST OF AMICI CURIAE

The Association on American Indian Affairs, Inc. is a non-profit membership corporation organized under the laws of the State of New York for the purpose of protecting the rights and improving the welfare of American Indians. The Association is the largest Indian-interest organization in the United States, and is nationwide in scope, with a membership of 50,000 that consists of both Indians and non-Indians. The Association frequently has participated in leading cases involving issues of Indian law before the federal and state courts, including the filing of a brief with this Court in *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975), and the filing of briefs *amicus curiae* in *The County of Oneida* v. *The Oneida Indian Nation*, Nos. 83-1065 and 83-1240 (filed July 16, 1984), *Solem* v. *Bartlett*, 104 S.Ct. 1161 (1984), *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), and numerous others.

The tribal *amici* are all federally recognized Indian tribes—two of which have organized under the Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq.* ("IRA") and two of which have not. Both Indians and non-Indians reside on the respective reservations of tribal *amici*.

The Pueblo of Laguna is organized pursuant to the IRA. The Pueblo Council's powers under its present constitution include, but are not limited to, the power "to

levy and collect taxes . . . from any member or other person or entity residing on or engaged in an activity on the lands of the Pueblo. . . ." Article IV, Section 2(f). The constitution nowhere provides for Secretarial review and approval of tribal tax ordinances. A holding that all tribal taxes must be approved by the Secretary of the Interior would overturn the decision made by the Pueblo and accepted by the Secretary of the Interior to eliminate federal supervision over the Pueblo's law-making.

The Cheyenne River Sioux Tribe also is organized pursuant to the IRA. Under its present constitution, the Secretary has only limited powers of review with respect to the Tribe's exercise of its taxation powers. Thus, a holding that Secretarial approval is required for all tribal tax ordinances would contradict a policy decision made by the Tribe at the time it adopted the constitution and impliedly confirmed by the Secretary when he subsequently approved the document.

The Nez Perce Tribe is not organized pursuant to the IRA. Under Article VIII, Section 1(c) of the Nez Perce constitution, the Nez Perce Tribal Executive Committee has authority, not subject to Secretarial review, to ". . . promulgate and enforce ordinances governing the conduct of all persons and activities within the boundaries of the Nez Perce reservation. . . ." A holding that the Secretary of the Interior is required to approve all tribal tax ordinances would have the effect of restoring Secretarial supervision over tribal lawmaking that was removed by the Tribe in its constitutional convention in 1983, which removal was approved by the Secretary of the Interior.

The Seneca Nation of Indians of New York also is not organized under the IRA. The Seneca Nation's Tribal

Council is governed by a constitution adopted originally in 1848 and last amended in 1978. In section XIII of the constitution, the Council has authority to enact laws and regulations free of Secretarial review and approval. A holding that all tribal taxes must be reviewed and approved by the Secretary of the Interior would dismantle a governmental process which has functioned efficiently and effectively for well over a century.

This case presents the important questions of (1) whether all tribes possess the inherent power to tax both Indians and non-Indians on their reservations, regardless of their form of government, and (2) whether tribes may exercise their inherent power to tax without first obtaining the consent of the Secretary of the Interior.

To facilitate the Court's consideration of the broad legal and policy issues in this case, *amici* intend to address the above described question in a manner somewhat different from the Respondent. Specifically, the attached brief is offered to assist the Court in recognizing that: (1) all Indian tribes, regardless of their form of government, possess the power to tax both Indians and non-Indians on their reservations as an incident of their original sovereignty, except where Congress or the tribe has provided expressly for a divestiture of such power; (2) the power of tribes to tax both Indians and non-Indians on their reservations without first obtaining Secretarial consent is consistent with the tribes' dependent status and is important as a flexible and efficient means to raise revenue for greatly needed services to Indians and non-Indians for which tribes primarily are responsible; and (3) numerous public policy reasons favor this Court's concurrence with the decision of the Secretary of the Interior that he need not review and approve the Navajo Tribe's tax ordinances.

SUMMARY OF ARGUMENT

The power of Indian tribal governments to tax both Indians and non-Indians on their reservations was affirmed by this Court in *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982), as an incident of tribes' inherent sovereignty. To generate desperately needed revenues for essential services available both to Indians and non-Indians, the Navajo Tribe enacted comprehensive, sophisticated value-added and property taxes applicable to Indian and non-Indian mineral producers, wholesalers and others conducting business on the reservation. Petitioner now seeks to distinguish *Merrion* by arguing that the Navajo Tribe's taxes are invalid without approval by the Secretary of the Interior.

A holding by this Court that all tribal taxes must be approved by the Secretary of the Interior would fly in the face of this Court's longstanding adherence to the fundamental principles governing the scope of tribal sovereignty and how that sovereignty properly might be divested or limited. Moreover, such a holding would controvert this Court's reasoning in *Merrion* that the power of Indian tribes to tax both Indians and non-Indians on their reservations is consistent with the tribes' dependent status, particularly since property, and not liberty, interests are at stake.

In this case, the Secretary of the Interior determined that he need not review and approve the Navajo Tribe's taxes. Consistent with past precedent, the Court should defer here to Congress in the exercise of its plenary power over Indian tribes and to the agencies responsible for Indian affairs in the exercise of their discretion for a determination of whether and how the sovereign taxing power of tribes should be limited. The vast complexities inherent in dealing with over 500 federally recognized tribes with diverse legal institutions and cultures argue strongly in favor of judicial restraint and deference to the branches of the federal government closest to the

affairs of Indian tribes. Moreover, the Secretary's decision accords with past and present federal Indian policy supporting the strengthening of tribal government on the reservations.

Significantly, until Congress acts to limit the exercise of tribes' inherent taxing authority by imposing a requirement for Secretarial review and approval, Petitioner and others similarly situated have numerous alternative, effective remedies which can ensure tribal taxes are not confiscatory or otherwise conflict with the Indian Civil Rights Act. Those remedies include appeals to tribal forums, as this Court emphasized in *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978), federal court review pursuant to federal question jurisdiction over claims that the tribe is without particular powers to enforce its taxes and, possibly, federal court review pursuant to federal question jurisdiction under the Indian Commerce Clause or Interstate Commerce Clause of the United States Constitution.

ARGUMENT

I. THE POWER OF INDIAN TRIBES TO TAX INDIANS AND NON-INDIANS ON THEIR RESERVATIONS IS AN INCIDENT OF THEIR ORIGINAL SOVEREIGNTY WHICH HAS NOT BEEN DIVESTED OR CURTAILED BY FEDERAL LAW

In *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982), this Court upheld an Indian tribe's power to levy taxes upon non-Indians conducting business within a reservation as an incident of the Tribe's original, inherent sovereignty. Petitioner seeks to distinguish *Merrion* on the grounds that the Navajo Tribe is "unorganized" and that the Possessory Interest Tax and Business Activities Tax at issue here were not approved by the Secretary of the Interior. The holding sought by Petitioner would emasculate the sovereign powers of Indian tribes, which this Court repeatedly has recognized, and would impose upon the Secretary a duty which no federal law requires or authorizes him to perform.

A. Tribal Taxation of Non-Indians Doing Business on Indian Reservations Is Not Inconsistent with the Tribes' Dependent Status or Otherwise Axiomatically Precluded by the Federal-Traded Relationship.

Since the earliest years of the Republic, judicial, legislative and executive branch decisions regarding the powers of Indian tribes have adhered to three important principles. First, during the pre-colonial period, Indian tribes constituted distinct, independent political communities and possessed all sovereign powers that characterize any sovereign state, including, in a more modern context, the power of taxation. *United States* v. *Wheeler*, 435 U.S. 313 (1978); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832); F. Cohen, *Handbook of Federal Indian Law* (1982 Ed.) 232 ("Cohen"). Second, by virtue of their relationship to European colonizers and, subsequently, the United States, Indian tribes lost such significant attributes of sovereignty as the power to enter into treaties with foreign nations (*Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); 55 I.D. 14, 22, "Powers of Indian Tribes" (1934)), the power unilaterally to alienate tribal lands (*Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823)), and, as recently postulated by the Court, also those powers which are "inconsistent with their dependent status." *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978). Third, by virtue of their relationship to the United States, Indian tribes also are subject to the plenary power of Congress further to remove or qualify their remaining sovereign powers, but to the extent not so limited, their original powers still are retained. Cohen at 241-242.

The sovereign power of Indian tribes to tax both Indians and non-Indians doing business on their reserva-

tions plainly is not impaired by their loss of authority over foreign relations or land alienation. Moreover, this Court has determined that tribal taxes covering on-reservation commercial activities validly can be imposed upon non-Indians and, therefore, such taxes cannot be deemed inherently inconsistent with the tribes' dependent status. *Merrion* v. *Jicarilla Apache Tribe*, *supra*; *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).[1] Thus, the sole question before the Court is whether Congress, in the exercise of its plenary power, has required Secretarial approval of tribal tax ordinances or has limited taxation of non-Indians to tribes which have adopted constitutions and charters under the Indian Reorganization Act, 48 Stat. 984, 25 U.S.C. §§ 461, 476, 477, or a like federal statute.

This Court has never suggested, much less found, that the Secretary of the Interior possesses some unspecified, yet broad and overriding authority to pass upon the governmental acts of Indian tribes pursuant to any general federal legislation. (*See* pp. 15-18, *infra.*) To the contrary, in considering whether a limitation of tribal sovereignty has occurred, the Court repeatedly has ruled that, in order to nullify or qualify Indian sovereign powers, Congress must clearly manifest its intention to do so in the words of a statute or in its legislative history.[2] *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978); *Menominee Tribe of Indians* v. *United States*, 391 U.S. 404 (1968). The two statutes upon which Petitioner relies fail to meet that critical test.

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[1] In so determining, the Court has distinguished property interests from the liberty interests at stake in *Oliphant*, 435 U.S. 191, in which the Court held Indian tribes may not prosecute and convict non-Indians because by virtue of their dependent status tribes lost their original power to restrain the liberty interests of non-Indians.

[2] Similarly, "[a]mbiguities in federal law havxe been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 143-44 (1980).

B. Federal Statutes Do Not Divest or Limit the Inherent Power of All Indian Tribes to Tax Indians and Non-Indians on Their Reservations.

1. *Congress Intended in the Indian Reorganization Act to Provide for the Expansion of Tribal Powers and Strengthening of Tribal Government on the Reservation.*

In the years just preceding passage of the Indian Reorganization Act, 48 Stat. 984 (1934) ("IRA"), federal Indian policy was departing from the assimilationism embodied in the General Allotment Act of 1887, 24 Stat. 388, towards a policy of encouraging tribal political and economic self-determination. Cohen at 145-49. The IRA was the apex of this movement to strengthen tribal government on the reservations. To help achieve that objective, Congress provided a package of benefits, including an *optional* means for tribes to create a centralized form of government ("Any Indian tribe . . . shall have the right to organize for its common welfare, and *may* adopt an appropriate constitution. . . ." (emphasis added) 25 U.S.C. § 476); confirmation and restoration of certain tribal powers which previously had been limited by Congress (*e.g.*, the restoration of tribal consent to the "sale, disposition, lease, or encumbrance of tribal lands . . .," *ibid*); authority for the acquisition of tribal lands lost through allotment and extension of federal loans for tribal economic development. 25 U.S.C. §§ 465, 470.

To avail themselves of the IRA's generous package of benefits, many tribes organized under the Act, but many did not. Getches, *Federal Indian Law* (1979) at 83. With respect to those tribes that did so organize, a substantial portion adopted constitutions incorporating boilerplate language furnished to them by the Department of the Interior, which draft language contained numerous authorities for the Secretary of the Interior to review and

approve tribal actions.[3] Significantly, Secretarial review was not required by the IRA or any other law, and thus some IRA tribes in their constitutions chose not to authorize the Secretary to review their ordinances. The Secretary, as required under the IRA, in fact has approved both categories of constitutions—namely, those with and those without Secretarial review and approval authority over tribal lawmaking. *See, e.g.*, Constitution of *Amicus Curiae* Pueblo of Laguna, 1958 and 1984 versions, wherein the Pueblo Council's powers include the right "[t]o levy and collect taxes, . . ." without a requirement of Secretarial review and approval. Article IV, Sec. 2(f); both the 1958 and 1984 versions of the Pueblo's Constitution were approved by the Secretary of the Interior.

Petitioner does not cite, and cannot cite, any provision in the IRA or in its legislative history where Congress manifested a plain intent to divest or restrict the inherent powers of tribes to tax on their reservations. Indeed, precisely the opposite conclusion is compelled by the text of the Act, which states in pertinent part:

> . . . *In addition to all powers vested in any Indian tribe or tribal council by existing law*, the constitution adopted by said tribe shall also vest in such tribe or tribal council the following rights and powers: . . . (Emphasis added.)

25 U.S.C. § 476. In an interpretive opinion issued shortly after passage of the IRA, the Solicitor for the Department of the Interior expressed the view that the "powers vested in any Indian tribe or tribal council by existing law," *i.e.*, pre-IRA, included the power to levy and col-

[3] The provision of specific authorities for Secretarial review of tribal lawmaking in the boilerplate constitution offered by the Department of the Interior lends further support to the argument that, without specific Congressional or tribal authorization, the Secretary may not substitute his judgment for that of tribes in regard to their governmental acts.

lect taxes from both Indians and non-Indians on the reservation. 55 I.D. 14, 16, 48 (1934). The IRA on its face confirmed that power in tribes which organized thereunder. The IRA, however, nowhere removed that power from tribes that did not so organize—a result which would have been wholly antithetical to its avowed purpose of strengthening tribal government.

Petitioner argues that this analysis leads to the allegedly anomalous conclusion that tribes organized under the IRA possess less freedom to tax non-Indians than unorganized tribes. Pet. Br. at 32. Petitioner's contention is factually inaccurate since, as previously noted, some IRA tribes have the power in their constitutions to adopt tax ordinances without Secretarial approval.[4] Moreover, even if the anomaly postulated by Petitioner actually existed, the remedy would lie with an amendment to the IRA by Congress, not in asking this Court to find words of limitation in the Act which simply are not there. In sum, given the absence of any language in the statute or its legislative history which purports, either expressly or impliedly, to curtail Indian sovereignty, Petitioner's argument that Congress intended in the IRA to restrict tribal autonomy by requiring all tribes to organize thereunder to protect their inherent powers and, furthermore, that substantial federal supervision of all tribal lawmaking, not anywhere previously authorized, for the first time was contemplated in the IRA necessarily must fail.

[4] The record does not show and it would be pointless to speculate whether particular IRA tribes surrendered their power to tax without Secretarial approval in a knowing exchange for other benefits under the Act, because they were badly advised by the Bureau of Indian Affairs (a distinct possibility in the light of history), or because taxation of non-Indians was not a major concern during the 1930's. The fact that tribes organized under the IRA may have given up some tax powers is irrelevant for purposes of considering the tax authority of tribes which did not so organize.

2. *Congress Intended in the 1938 Mineral Leasing Act to Provide a Comprehensive and Uniform Scheme for the Disposition of Tribal Proprietary Interests in Mineral Resources, While Leaving Unencumbered Tribal Governmental Powers to Tax Mineral Development.*

Petitioner next asserts that Congress in the Mineral Leasing Act of 1938, 52 Stat. 347, 25 U.S.C. § 396(a)-(g) ("1938 Act"), preempted the Navajo Tribe's power to impose taxes on mineral development activities. Pursuing this argument, Petitioner seeks to distinguish the Court's direct holding to the contrary in *Merrion* v. *Jicarilla Apache Tribe, supra,* on the ground that the 1938 Act gives effect to the governmental powers of IRA tribes, such as the Jicarilla Apache, but not the governmental powers of unorganized tribes, such as the Navajo. Pet. Br. at 37-39. The language and purpose of the statute, however, do not support this claimed distinction.

As this Court emphasized in *Merrion*, "[t]he mere fact that the government imposing the tax also enjoys rents and royalties as the lessor of mineral lands does not undermine the government's authority to impose the tax." 455 U.S. at 138. The proprietary interest of Indian tribes in their mineral resources and the governmental interest of Indian tribes in taxing mineral development activities are wholly distinguishable because they arise from two different legal sources—namely, the tribe as a landowner and the tribe as a sovereign. Petitioner's protestations notwithstanding, the governmental power to raise tax revenues is independent of, not incidental to, the power to lease property. Thus, even assuming, *arguendo*, that Congress in the 1938 Act preempted the power of non-IRA tribes to regulate mineral operations, the power of all tribes to tax the business of mining would remain unimpaired.

Petitioner's reliance for its preemption argument upon the proviso in section 2 of the 1938 Act, which permits

tribes organized *and incorporated* under the IRA to lease lands in accordance with their constitutions and charters, is clearly misplaced. Section 16 of the IRA, under which tribes can organize, contains no new or separate leasing authority; section 17, under which organized tribes can incorporate, does authorize leasing, but not "for a period exceeding ten years. . . ." 25 U.S.C. § 477. Since mineral leases generally run for a term of years "and as long thereafter as minerals are found in paying quantities," *i.e.*, longer than ten years, the right of IRA tribes under the 1938 Act to exempt themselves from Secretarial supervision is largely illusory. *Cf.* 25 C.F.R. § 211.29 ("The regulations in this part, in so far as they are not so superseded, shall apply to leases made by organized tribes if the validity of the lease depends upon the approval of the Secretary of the Interior.").

Petitioner's preemption argument also proves too much. The Navajo taxes here at issue cover not only mineral development activities, but also commercial and industrial operations conducted by both Indians and non-Indians. On almost all Indian reservations, the latter operations ordinarily take place on lands leased by the tribe, with the approval of the Secretary of the Interior, pursuant to the Long-term Leasing Act of 1955, as amended, 69 Stat. 539, 25 U.S.C. § 415 ("1955 Act"), which does not discriminate between IRA and non-IRA tribes. Thus, if subjecting tribal leases to detailed regulation by the Secretary preempts tribal taxing powers, as Petitioner claims, then Congress silently, but unequivocally must have precluded IRA tribes from taxing commercial and industrial operations under the 1955 Act, even though like taxes upon mineral development activities under the 1938 Act are sanctioned.[5] *Merrion* v. *Jicarilla Apache Tribe, supra.* Not one word in the 1955 Act

[5] Conversely, if the 1955 Act does not preempt the taxing powers of IRA tribes, then it also must not preempt the taxing powers of

[Continued]

or its legislative history lends support to such a bizarre result.

Finally, Petitioner's argument literally stands the federal preemption doctrine on its head. In previous cases, the Court has invoked that doctrine to oust state jurisdiction on an Indian reservation where federal and tribal interests sweep so broadly over the activity in question that no room is left for state regulation. *See, e.g., White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980); *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973). In short, the preemption doctrine has been employed to protect, not divest, tribal authority and has no application where, as here, the federal statute involved (1938 Act) is consistent with and, indeed, designed to encourage the exercise of tribal sovereign powers.

As trustee, the United States must consent to every method by which interests in Indian lands are alienated, including, of course, sale of the underlying minerals. Before 1938, the requisite consent to the sale of their mineral resources had been granted to most tribes in numerous piecemeal leasing acts. *See, e.g.*, 25 U.S.C. §§ 396, 397, 398, 398a, 398b, 399, 400a, 401, 403 and 477 (IRA). In general, Congress intended in the 1938 Act to supplant these diverse earlier statutes by establishing a uniform and more comprehensive scheme for the leasing of minerals on Indian lands, while yet preserving the specific tribal leasing authorities contained in the recently enacted IRA. 25 U.S.C. § 396b; *see* H.R. Rep. No. 1872, 75th Cong., 3d Sess. at 1-3 (1938), and S. Rep. No. 985, 75th Cong., 1st Sess. at 2-3 (1937).

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[6] [Continued]

unorganized tribes and the Navajo tax ordinances are valid with respect to commercial, industrial and other business operations. Petitioner, however, cannot show that Congress ever intended to draw a distinction between mining and other business activities for purposes of tribal taxation.

Petitioner cannot cite any language in the 1938 Act or its legislative history which indicates, expressly or impliedly, an intent on the part of Congress to divest, limit or even deal with tribal governmental powers. To the contrary, the 1938 Act, like the IRA, plainly was designed to foster tribal economic development and, in particular, to help achieve the federal policy of strengthening tribal governments in part by vesting leasing decisions in the tribes instead of the Indian agents, as was the procedure under some earlier leasing acts. *See* 25 U.S.C. § 399; *compare* 25 U.S.C. § 476 (granting Indian tribes the right "to prevent the sale, disposition, lease, or encumbrance of tribal lands . . . without the consent of the tribe. . . ."). Congress could have addressed tribal taxing powers in the 1938 Act, but did not. Given this omission, as well as the legal and historic background of the legislation, the conclusion is inescapable that Congress could not have intended, in a statute concerned only with the leasing of tribal property interests, to circumscribe tribal governmental powers, regardless of whether or how the tribes might be "organized."

C. Absent Tribal Consent, the Secretary of the Interior Lacks Authority under Existing Federal Law to Approve Tribal Tax Ordinances or Otherwise to Qualify the Tribes' Inherent Power to Tax.

On numerous occasions, most of which are cited by Petitioner (Br. at 15, n.6), Congress expressly has empowered the Secretary of the Interior to review tribal actions. *See, e.g.*, 25 U.S.C. §§ 81, 121-25, 263, 311-21, 415. Congress, however, has not granted the Secretary any specific authority to review and approve tribal tax ordinances, and the Navajo Tribe has not voluntarily consented to the exercise of Secretarial supervision over its inherent power to tax. In the absence of specific legislation or tribal consent, the Secretary plainly appears to lack authority to pass upon the validity or wis-

dom of tribal taxes—and he has taken precisely that position in this case. The Court should do likewise.

Petitioner, however, seizes upon a statement in *Merrion* that "the Tribe must obtain the approval of the Secretary before any tax on nonmembers can take effect" (455 U.S. at 141, 155) and builds out of it an argument that no tax on non-Indians by any tribe is valid without Secretarial sanction. Pet. Br. at 16-19. This statement and similar references to Secretarial approval in *Merrion* obviously are quoted out of context. The Jicarilla Apache Tribe is governed by a constitution which expressly provides that ordinances imposing a tax upon non-members doing business on the reservation are "subject to approval by the Secretary of the Interior" (455 U.S. at 135), and Secretarial approval, therefore, was a condition precedent to validity of the Jicarilla Apache tax. The Navajo Tribe, other unorganized tribes and many IRA tribes are not so governed.

In a further misreading of *Merrion*, Petitioner stresses Justice Marshall's footnoted point that an amendment to the Jicarilla Apache Constitution was "the critical event necessary to *effectuate* the tax" (455 U.S. at 148, n.14, emphasis in original, cited at Pet. Br. 16), arguing therefrom that the Court already has held adoption of an IRA constitution and prior Secretarial approval to be essential to implementation of a tribal tax. Pet. Br. at 16-17. Justice Marshall's conclusion, though, clearly was addressed to the unique constitutional history of the Jicarilla Apache Tribe. For the Navajo Tribe, which has no like history, the critical language in this portion of the *Merrion* opinion is Justice Marshall's earlier point, in the same footnote, that a tribe's constitution is not the font of its sovereign power and "[b]ecause the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power to tax remains intact." 455 U.S. at 148, n.14. In short,

a requirement that Secretarial approval be given before tribal tax ordinances are effective cannot be found in the Court's reading of the IRA.[6]

Similarly, no authority for conditioning tribal tax powers upon Secretarial review may be implied from 25 U.S.C. §§ 2 and 9, which empower the Commissioner of Indian Affairs and the President to promulgate and enforce regulations governing Indian affairs. Indeed, a mere reading of these statutes should completely dispel that thesis. 25 U.S.C. § 9, for example, stipulates:

> The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.

The plain meaning of the language in § 9 is that the President is authorized to enforce with reasonable regulations the specific duties with respect to Indian affairs found in other federal statutes. Stated another way, in and of itself § 9 is not authority for the executive to undertake any function outside of the specific responsibilities which Congress has elsewhere provided. *Romero* v. *United States*, 24 Ct. Cl. 331 (1889).

In like vein, the legislative history of § 2 indicates that the primary purposes of that section were to transfer Indian affairs out of the Department of War and into the Department of the Interior and to authorize the promulgation of rules and regulations for carrying into effect the directives found in other specific acts of Congress. 5 Op. Atty. Gen. 36 (1848); *United States* v. *Van Wert*, 195 F. 974 (D.C. Iowa, 1912). Here, too, in and

[6] The Court's observation that Secretarial review, in addition to the plenary power of Congress to restrict tribal sovereignty, "minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner" (455 U.S. at 141) does not rise to the conclusion that Secretarial approval is a prerequisite to tribal taxation. The same safeguards can be achieved through a number of alternative proceedings. *See*, pp. 25-28, *infra*.

of itself § 2 cannot serve as authority for the Secretary to divest or limit the inherent sovereign right of tribes to tax because such authority does not exist in other congressional enactments.

Given the absence of action by Congress, this Court should not labor to find a requirement that the Secretary review and approve every exercise of tribal tax powers—particularly in view of the strong tribal interests at stake in this case.[7] *Merrion* v. *Jicarilla Apache Tribe, supra*; *Washington* v. *Confederated Tribes of the Colville Indian Reservation, supra.* Instead, consistent with the rule that limitations on tribal sovereignty must be clearly expressed in a statute or its legislative history (*see* p. 8, *supra*), the Court should find that the Secretary lacks supervisory authority with respect to the Navajo Tribe's right to tax.

II. EVEN IF THE SECRETARY HAS THE POWER UNDER FEDERAL LAW TO REVIEW TRIBAL TAX ORDINANCES, THE AUTHORITY IS DISCRETIONARY, AND IN LIGHT OF SETTLED LEGAL PRINCIPLES AND COMPELLING POLICY CONSIDERATIONS, GREAT DEFERENCE SHOULD BE ACCORDED THE DECISION OF THE SECRETARY NOT TO EXERCISE HIS DISCRETION.

A. With Respect to the Management of Indian Affairs, Courts Uniformly Have Accorded Great Deference to Decisions of the Secretary Made in the Exercise of His Discretionary Authority Under Federal Law.

Conceding for purposes of argument only that 25 U.S.C. §§ 2 and 9 empower the Secretary to review an exercise of the inherent tribal power to tax, that authority on the face of the statutes themselves plainly is discretionary. In 25 U.S.C. § 2, the Commissioner is vested with the general management of Indian affairs, but the provision contains no language whatsoever defining or limiting the manner in which the authority is to be exercised. Similarly, under 25 U.S.C. § 9, "the President *may* prescribe such regulations as he *may* think fit . . . ." (emphasis added)—thus leaving no doubt that the Secretary's administration of Indian affairs pursuant to the foregoing provisions is fundamentally a matter of discretion. Significantly, courts reviewing the decisions of the Secretary and other federal agencies charged with the management of Indian affairs have emphasized repeatedly the great deference which is to be accorded agency interpretations of the scope of their discretion and its exercise. *See, generally, Udall* v. *Tallman*, 380 U.S. 1 (1965); *Board of Commissioners of Pawnee County* v. *United States*, 139 F.2d 248 (10th Cir. 1943); *McQueary* v. *Laird*, 449 F.2d 608 (10th Cir. 1971); *National Indian Youth Council* v. *Bruce*, 485 F.2d 97 (10th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974), *reh. denied*, 419 U.S. 886 (1974).

The reasons for the deference which is accorded decisions of the Secretary in the area of Indian affairs are apparent. Under federal law and regulations the Secretary is the federal official primarily charged with carrying out the responsibilities of the United States with respect to Indian tribes. In performing this function for over a century, the Secretary has acquired considerable expertise and understanding concerning Indian matters.

Furthermore, the area of Indian affairs is undeniably complex from a legal and cultural standpoint. Over 500 tribes, including both IRA and non-IRA tribes, are recognized by the United States, and their cultural and political structure and organization vary tremendously. Getches, *Federal Indian Law* 5 (1979). The tribes range in membership from 15 to 146,000, and the size of their

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[7] In an effort to lend a gloss of harship to its position, Petitioner lays before the Court a parade of horribles in enforcement of the Navajo tax ordinances from which it does not actually now suffer. Pet. Br. at 40-41. The Court should not be misled into creating an unprecedented new remedy for a presently non-existent wrong.

reservations varies from 50 acres to over 13 million acres. *Id.* at 4-5. The size of tribal governing bodies ranges from three to seventy-eight. *Federal and State Indian Reservations*, U.S. Department of Commerce (1975).

In light of these numerous complexities and the Secretary's experience and expertise in dealing with them, the deference which the judiciary historically has paid to his decisions concerning Indian affairs is justified. Thus, the Court should be extremely reluctant to impose upon the Secretary a specific duty with respect to Indian affairs which the Secretary, in his lawful discretion, has declined to perform.

B. The Secretary's Decision Not to Review the Navajo Tax Ordinances Conforms Completely with Past and Present Federal Indian Policy Which Is Intended to Promote the Political Self-Determination and Economic Self-Sufficiency of Indian Tribes.

With only a brief exception in the early 1950's, the overriding objectives of federal Indian policy for the past half century have been to promote the political self-determination and economic self-sufficiency of Indian tribes. Enactment of the seminal IRA in 1934 signalled a dramatic reversal of the previous federal policy of dismantling reservations and assimilating Indians into non-Indian society. The IRA's principal goal was to strengthen tribal governments, and it did so in significant part by modifying or limiting the supervisory practices of the Interior Department over the activities of tribes, thereby enabling tribes to exercise more fully the inheernt powers of government they possessed. Cohen at 129-30.

In 1970 President Nixon emphatically reaffirmed this Indian policy in a formal Administration declaration:

> It is long past time that the Indian policies of the Federal government began to recognize and build upon the capacities and insights of the Indian people. Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.

H.R. Doc. No. 363, 91st Cong., 2d Sess. (1970). In accordance with this statement, Congress subsequently enacted two pieces of legislation proposed by the President which further freed the tribes from needless federal bureaucratic interference, and provided them with real opportunities to govern the affairs of their reservations. *See* Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 25 U.S.C. §§ 545n, 455-58e; Indian Financing Act of 1974, Pub. L. No. 93-262, 25 U.S.C. §§ 1451 *et seq.*

More recently President Reagan issued yet another Indian policy statement which emphasized identical themes:

> This Administration honors the commitment this nation made in 1970 and 1975 to strengthen tribal governments and lessen federal control over tribal governmental affairs. This Administration is determined to turn these goals into reality. Our policy is to reaffirm dealing with Indian tribes on a government-to-government basis and to pursue the policy of self-government for Indian tribes without threatening termination. . . .
>
> Tribal governments, like state and local governments, are more aware of the needs and desires of their citizens than is the federal government and should, therefore, have the primary responsibility for meeting those needs. The only effective way for Indian reservations to develop is through tribal gov-

ernments which are responsive and accountable to their members. . . .

Without sound reservation economies, the concept of self-government has little meaning. In the past, despite good intentions, the federal government has been one of the major obstacles to economic progress. This Administration intends to remove the impediments to economic development and to encourage cooperative efforts among the tribes, the federal government and the private sector in developing reservation economies.

White House Indian Policy Statement (January 23, 1983).

The Secretary's decision not to review the Navajo tax ordinances is in clear accord with the dictates of the federal Indian policy statements quoted above. Specifically, where an inherent power of tribal government as fundamental as the authority to tax is involved, the Secretary's withholding from the exercise of a discretionary right to review not only is appropriate, but, indeed, represents a salutary effort on his part to afford a broad scope for the efforts of tribes to determine their own futures. *See, generally, Merrion* v. *Jicarilla Apache Tribe, supra.*

The Secretary's conclusion is even more compelling given the present economic circumstances of most Indian tribes, including the Navajo. In consonance with President Reagan's Indian policy statement and for other unrelated reasons, federal funding on Indian reservations has declined dramatically as the Administration has sought to emphasize the private sector at the direct expense of federal program monies. *See* Letter to the Honorable Pete Domenici, Chairman, Senate Budget Committee, from the Honorable Mark Andrews, Chairman, Senate Select Committee on Indian Affairs, Transmitting

Budget Views and Estimates for Fiscal Year 1985, at pp. 3-4. In direct proportion to the diminution of federal funds, Indian tribes increasingly have been required to bear the burden of providing basic governmental services on Indian reservations.

More important, the beneficiaries of the tribal governmental services are not limited to members of the tribe itself. The Petitioner and its *amici*, for example, which voluntarily entered the Navajo Reservation to remove nonrenewable resources for a profit, also plainly benefit from the Navajo Tribe's provision of basic governmental services throughout the reservation. The protestations of Petitioner and its *amici* in opposition to a tribal tax are especially inappropriate at a time when their federal tax burden has been reduced significantly and any tribal taxes which they might pay are deductible for federal taxation purposes under the Indian Tribal Governmental Tax Status Act of 1982, Pub. L. No. 97-473, 96 Stat. 2607, as amended by Pub. L. No. 98-369 (1984). Under the foregoing circumstances, Petitioner hardly should be heard to complain about the Secretary's failure to review the Navajo Tribe's exercise of its inherent tax powers.

C. The Secretary's Decision Also Is Justified Fully by the Tribe's Full and Careful Consideration and Enactment of Its Taxes and Implementing Regulations.

The Navajo Tribal Council created the Navajo Tax Commission in 1974, but the Tribe did not enact the taxes at issue here until 1978. In the interim, the Tribe undertook a careful and exhaustive study of the economic and legal issues associated with a Tribal taxation program. In presenting tax proposals to the Navajo Tribal Council, the Navajo Tax Commission emphasized that it

proposed broad-based taxes applicable to both Indians and non-Indians which are fair and efficient, and which, in the early years, would tap the major sources of wealth on the Navajo Reservation.[8] *See Report of the Advisory Committee of the Navajo Tribal Council Regarding Navajo Tax Proposals* (November, 1976).

Following enactment of the Navajo tax laws as proposed by the Commission, two public hearings were held to receive comments on the Tribe's proposed regulations. Because of litigation challenging the Tribe's taxes, final regulations were not adopted, and the Navajo Tax Commission subsequently held yet another public hearing on its proposed tax regulations in November, 1984. Without exception, potential non-Indian taxpayers, including many of Petitioner's *amici*, were invited to and many did present very helpful oral and written comments on the Tribe's proposed regulations.

In view of the comprehensive and thorough consideration by the Navajo Tribe of appropriate tribal taxes and the consistent efforts by the Tribe to involve its potential taxpayers in the development of sound and fair procedures for tax enforcement, the decision of the Secretary not to review the Navajo tax ordinances should be

[8] *Amicus Curiae* Texaco, Inc. suggests that the Navajo Tribe enacted its taxes pursuant to a belief that the Tribe was not being compensated adequately in royalties and thus needed to tax Petitioner and its *amici*. In support of this statement, *amicus* cites wholly out of context statements in a paper which concluded not only that many of the leases at Navajo were some of the least favorable in the United States with respect to benefits to the lessor, but also that because the leases correspondingly contained high economic rents, they are an especially attractive potential tax base from a tax administration standpoint. *See* Williams and Cole, "Resource, Revenue and Rights Reclamation: A Tax and Sulphur Emissions Program for the Navajo Nation" (March, 1978).

upheld. To hold the Secretary responsible for reviewing all tribal tax ordinances regardless of the particular circumstances facing each tribe in its decision whether and how to enact and enforce a taxation program is not only inefficient and impractical, but also conflicts directly with the major thrust of five decades of federal policy concerning Indian self-government and political self-determination.

D. Petitioners Have Numerous Effective Remedies for Their Now Premature Complaints Regarding the Application and Enforcement of Tribal Taxes.

Petitioner and its *amici* devote literally pages of their briefs to a gratuitous—in light of its prematurity—description of the allegedly non-remediable parade of horribles which will befall non-Indian businesses and taxpayers if the tribal tax program is allowed to go forward. This tactic represents little more than a brazen and irrelevant attempt to convince the Court not as a matter of law but of policy that the Secretary must be held to a duty to supervise the lawmaking of tribal governments. The arguments are gross distortions of fact and serve only to emphasize the weakness of Petitioner's position.

Assuming, *arguendo*, that the Tribe has enforced its taxes with respect to Petitioner and its *amici*, numerous legislative, judicial and contractual remedies are available to both Indians and non-Indians who have complaints against the decisions of tribal governments. This Court, therefore, need not establish by implication the additional unprecedented and drastic remedy of mandatory federal supervision over all tribal lawmaking.

First, tribal governments are limited in their decisionmaking by the requirements of the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-03, which establishes rights to due process and equal protection that are directly analogous to those set forth in the federal Constitution. As this Court has stated previously, with respect to enforcement of the Act,

> Tribal forums are available to vindicate rights created by ICRA, and § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply. *Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians. See, e.g., Fisher* v. *District Court*, 424 U.S. 382, 47 L.Ed.2d 106, 96 S. Ct. 943 (1976); *Williams* v. *Lee*, 358 U.S. 217, 3 L.Ed.2d 251, 79 S. Ct. 269 (1959). *See also Ex Parte Crow Dog*, 109 U.S. 556, 27 L.Ed. 1030, 3 S. Ct. 396 (1883). Nonjudicial tribal institutions have also been recognized as competent law-applying bodies. *See United States* v. *Mazurie*, 419 U.S. 544, 42 L. Ed.2d 706, 95 S. Ct. 710 (1975). [Emphasis added.]

Santa Clara Pueblo v. *Martinez*, 436 U.S. 49, 65 (1978).

In addition to tribal legislative and judicial forums, Petitioner and *amici* also have a federal judicial forum as evidenced by this and other federal court actions based on federal question jurisdiction where a tribe allegedly is without authority in particular cases to assert its power over non-Indian activities on the reservation. *See Snow* v. *Quinault Indian Nation*, 709 F.2d 1319 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 2655 (1984); *Babbitt Ford, Inc.* v. *Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983). Petitioner also may have a right of federal review of tribal taxes which allegedly infringe upon interstate commerce in violation of the Indian Commerce Clause or the Interstate Commerce Clause of the United States Constitution. *Merrion* v. *Jicarilla Apache Tribe, supra.*

Petitioner and *amici* also can avail themselves of a congressional remedy in light of Congress' plenary power over Indian tribes. *See, generally, Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831); *United States* v. *Kagama*, 118 U.S. 375 (1886). Congress can act quickly

and decisively to confer mandatory Secretarial authority, as it has many times in the past, if it perceives problems in the exercise of tribal powers of taxation. Indeed, in light of that broad congressional authority over Indian affairs, this Court itself has observed that its role in adjusting relations between tribes and reservation residents correspondingly is restrained. *Santa Clara Pueblo* v. *Martinez, supra.* If Petitioner and its *amici* encounter the parade of horribles which they evidently anticipate, they should take their enforcement complaints to tribal and federal forums or to the Congress rather than ask the Court to depart so radically from its established principle of restraint by emasculating tribal sovereignty at the outset.

Finally, the tribes themselves have ample incentives to protect fully and fairly the property interests of non-Indians on their reservations. In accordance with current federal Indian and tribal policies, virtually every tribe is promoting greater private sector business activities on the reservations.[9] Such efforts are particularly urgent in view of the substantial and continuing decline of federal employment opportunities on reservations.

Tribal economies, however, are capital-scarce and non-Indian investment and credit, therefore, typically are required to expand private sector business activities on the reservations. To attract such non-Indian businesses, tribes must ensure full protection of non-Indian interests. Indian tribes are doing so by successfully negotiating

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[9] Ironically, many attempts by tribes in the past to involve non-Indians in reservation development activities have been dismal. The lack of tribal business and legal expertise and commercial experience, and the failure of the United States as trustee to effectively assist tribes, resulted in commercial transactions to extract Indian resources under which the tribal royalty income is paltry in comparison to the take of the states through taxation and the benefit to non-Indian consumers in the form of low-cost electricity. *See Leased and Lost*, Council on Economic Priorities (New York, 1974).

complex contracts with non-Indians which contain, *inter alia*, waivers of the tribes' sovereign immunity from suit, tribal consent to federal court jurisdiction over disputes, and provisions for valuable tribal security to be held off-reservatio non behalf of the non-Indian participants.[10]

As the foregoing reveals, Petitioner and its *amici* now have numerous effective legal, legislative and contractual remedies to protect fully their business interests on reservations. This Court, therefore, should not strain to find an additional remedy in the form of Secretarial review and approval of every law enacted by the over 500 tribal governments throughout the United States. Such pervasive federal involvement in tribal governments is not authorized by law, is inconsistent with federal Indian policy affirming tribal self-government on reservations and minimal federal intrusion into tribal decisionmaking, and would place enormous administrative burdens on the Secretary which he himself has sought explicitly to avoid. Accordingly, this Court should defer to Congress, as it has without exception in the past, to decide whether and how such comprehensive federal involvement in tribal government should occur.

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[10] *Amicus Curiae* Pueblo of Laguna, for example, recently entered into a multi-year contract with the Raytheon Corporation under which a Pueblo business corporation, with the vital assistance of Raytheon, will assemble and test communications equipment under a contract with the Department of the Army.

CONCLUSION

Petitioner asserts that "unorganized" Indian tribes have no power to tax non-Indians doing business on their reservations and that, even if such authority exists, the Secretary of the Interior must approve each exercise of the tribes' inherent power to tax. As has been demonstrated, Petitioner's thesis is contrary to repeated decisions of this Court upholding the exercise of tribal sovereign powers and finds no support in either existing laws or federal policy. The decision of the Court of Appeals sustaining the Navajo Tribe's tax ordinances without Secretarial approval should be affirmed.

Respectfully submitted,

ARTHUR LAZARUS, JR., P.C.*
W. RICHARD WEST, JR.
FRIED, FRANK, HARRIS, SHRIVER & KAMPELMAN
600 New Hampshire Ave., N.W.
Suite 1000
Washington, D.C. 20037
(202) 342-3500

Attorneys for Association on American Indian Affairs, Inc., Cheyenne River Sioux Tribe, Nez Perce Tribe, Pueblo of Laguna and Seneca Nation of Indians

* Attorney of Record

December 26, 1984